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The War Powers Resolution and Antiterrorist Operations

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Following is a statement by Abraham D. Sofaer, Legal Adviser, before the Subcommittee on Arms Control, International Security and Science of the House Foreign Affairs Committee, Washington, D.C., April 29, 1986.

I am pleased to have the opportunity to appear before you today to discuss the War Powers Resolution in the context of recent events. I would like to begin by setting out some general considerations regarding the resolution and then focus on the application of the resolution to specific cases which are of particular interest to the subcommittee.

Basic Framework

The War Powers Resolution was enacted in 1973 in order to ensure congressional involvement in situations in which the United States may become engaged in hostilities with other states. To that end, the resolution contains certain requirements concerning consultation, reporting, and termination of the use of U.S. Armed Forces. Of course, this and other administrations have expressed serious doubts about the wisdom and constitutionality of various parts of the resolution.

Consultation Requirement. The consultation requirement is contained in section 3, which provides:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

The resolution specifies only that consultation occur "before introducing" armed forces in the situations specified, as well as "after" each such introduction until the situation ends. It does not define the nature of the consultations required, but allows the President to determine precisely how such consultations are to be carried out. Significantly, in making the requirement applicable only where consultation is "possible," the resolution expressly contemplates that consultation in a particular case will depend on the prevailing circumstances.

Over the years, both before and after the resolution was adopted, the executive branch has engaged in consultations with the Congress in a variety of circumstances involving the possible deployment of U.S. forces abroad. Consultations have occurred in cases where the resolution might have been thought to require them and in cases where it clearly would not (and the executive branch has typically been careful to preserve its position on these matters when consulting). The purpose of such consultations is to keep the Congress informed, to determine whether the Congress approves of a particular action or policy, and to give the Congress an opportunity to provide the President with its views, especially where it may disagree with the policy. Consultations are not intended to involve the Congress in reviewing the detailed plans of a military operation. The degree to which the President is implementing a policy of which the Congress is well aware and which it has already approved in principle is one important factor to be considered in determining the nature and timing of consultations.

In practice, the form and substance of consultations have depended upon the circumstances of each case. In some instances, such as the introduction of U.S. forces into Egypt to participate in peacekeeping operations or the case of the Vietnam evacuation, the situation permitted detailed consultations well in advance of the action contemplated. In the case of the Tehran rescue mission, prior consultation was not possible because of extraordinary operational needs.

Reporting Requirement. Section 4 of the resolution requires that the President submit, within 48 hours after the introduction of U.S. forces, a written report to the Congress in three circumstances. A report must be submitted when U.S. forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." In addition, a report must be submitted when U.S. forces are introduced "into the territory, airspace or waters of a foreign nation, while equipped for combat" (with certain specified exceptions) or when such forces are introduced "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. . . ."

Both Republican and Democratic presidents have provided written reports to the Congress with respect to U.S. deployments abroad as a means of keeping the Congress informed, while

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reserving the executive branch's position on the technical applicability and constitutionality of the resolution. Reports were submitted by President Ford in connection with the Indochina evacuations and the Mayaguez incident and by President Carter in connection with the Tehran rescue mission. During the Reagan Administration, reports were submitted with respect to U.S. participation in the Multinational Force and Observers in the Sinai and the Multinational Force in Lebanon, the deployment of U.S. aircraft in connection with the situation in Chad, and the introduction of U.S. forces into Grenada. More recently, a report was submitted concerning the encounter with Libyan forces during U.S. military exercises in and near the Gulf of Sidra in late March, and a report was submitted with respect to the April 14 operation against Libya. Indeed, the executive branch has provided information to the Congress in many cases where no relevant statutory requirement existed.

Termination of Use of U.S. Forces. Section 5 of the resolution provides that, within 60 days after a report is submitted or required to be submitted, the President must terminate the use of U.S. forces unless the Congress has declared war or specifically authorized the use of such forces, has extended the 60-day period, or is physically unable to meet as a result of an armed attack on the United States. The section also provides that the President must remove U.S. forces from engagement in hostilities abroad "if the Congress so directs by concurrent resolution." The legislative veto provision of the resolution cannot stand in the face of the Supreme Court's 1983 decision in *INS* v. *Chadha*.

The executive branch has historically differed with the Congress over the wisdom and constitutionality of the 60-day provision of section 5. As President Reagan made clear in signing the Multinational Force in Lebanon resolution on October 12, 1983, the imposition of such arbitrary and inflexible deadlines creates unwise limitations on presidential authority to deploy U.S. forces in the interests of U.S. national security. Such deadlines can undermine foreign policy judgments and adversely affect our ability safety and effectively to deploy U.S. forces in support of those judgments.

Moreover, the President's constitutional authority cannot, in any event, be impermissibly infringed by statute. Section 8(d) of the resolution itself makes clear that the resolution was not intended to alter the constitutional authority of the President. The President has constitutional power, as Commander in Chief and as the nation's principal authority for the conduct of foreign affairs, to direct and deploy U.S. forces in the exercise of self-defense, including the protection of American citizens from attacks abroad. From the time of Jefferson to the present, presidents have exercised their authority under the Constitution to use military force to protect American citizens abroad.

I would also mention that serious constitutional problems exist with respect to section 8(a) of the resolution, which purports to limit the manner in which the Congress may, in the future, authorize the use of U.S. forces. I do not believe that one Congress by statute can so limit the constitutional options of future Congresses. Nor can Congress control the legal consequences of its own actions. If a particular congressional action constitutes legal authority for the President to undertake a specific operation, I doubt that one Congress can change that fact for all future times by requiring a specific form of approval.

Recent Cases

The War Powers Resolution was enacted in the shadow of U.S. involvement in the Vietnam war and of the so-called Watergate scandals. In more recent years, however, issues have been raised under the resolution in situations that bear no resemblance to the Vietnam war and, in fact, may not have been contemplated at the time of its adoption.

Deployment of Antiterrorist Units. It is a regrettable reality in today's world that Americans abroad are increasingly subjected to murder, kidnapings, and other attacks by terrorists who seek to further their political ends through such means. The hijacking last year of TWA Flight 847, with the murder of Navy diver Stethem, is a well-known recent example. In that case, we had no reason to believe that the Government of Lebanon had encouraged or otherwise supported the terrorists; it was simply unable to control them. In such a situation, the President may decide to deploy specially trained antiterrorist units in an effort to secure the release of the hostages or to capture the terrorists who perpetrated the act. Does the War Powers Resolution require consultation and reporting in this kind of situation?

We have substantial doubt that the resolution should, in general, be construed to apply to the deployment of such antiterrorist units, where operations of a traditional military character are not contemplated and where no confrontation is expected between our units and forces of another state. To be sure, the language of the resolution makes no explicit exception for activities of this kind, but such units can reasonably be distinguished from "forces equipped for combat" and their actions against terrorists differ greatly from the "hostilities" contemplated by the resolution.

Nothing in the legislative history indicates, moreover, that the Congress intended the resolution to cover deployments of such antiterrorist units. These units are not conventional military forces. A rescue effort or an effort to capture or otherwise deal with terrorists, where the forces of a foreign nation are not involved, is not a typical military mission, and our antiterrorist forces are not equipped to conduct sustained combat with foreign armed forces. Rather, these units operate in secrecy to carry out precise and limited tasks designed to liberate U.S. citizens from captivity or to attack terrorist kidnapers and killers. When used, these units are not expected to confront the military forces of a sovereign state. In a real sense, therefore, action by an antiterrorist unit constitutes a use of force that is more analogous to law enforcement activity by police in the domestic context than it is to the "hostilities" between states contemplated by the War Powers Resolution.

I might note, in this connection, that other types of cases involving military deployments—such as the movement of warships into or through foreign territorial waters, the deployment abroad of security personnel such as marine embassy guards, and transits of combat aircraft through foreign airspace—have generally been considered to be outside the scope of the resolution. The rationale for regarding the resolution inapplicable is at least as strong in the case of limited, antiterrorist deployments as it is in these other cases, absent the involvement of the armed forces of a foreign state.

Even assuming the resolution were applicable to the deployment of special antiterrorist units, the fact is that consultations may not—and generally will not—be possible in such cases. The existence and purpose of these units is well known to the Congress. The need for swiftness and secrecy inherent in the nature of those activities is so extraordinary that consultations prior to deployment might well jeopardize the lives of our units and the hostages they may seek to liberate.

Engagement During Military Exercises. Issues under the War Powers Resolution have also been raised where U.S. forces have engaged in a military exercise in conformity with international law. The incident in the Gulf of Sidra in late March illustrates the situation. Does the resolution require the President to consult and report in this kind of case?

Some factual background will help to put this question in perspective. The

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United States is committed to the exercise and preservation of navigation and overflight rights and freedoms around the world. That is the purpose of the freedom of navigation program. A deliberate decision was made during the Carter Administration to discourage or negate unlawful claims to extended jurisdiction in the oceans. That policy was affirmed in 1982 under President Reagan, and in 1983 the essence of the policy became public in a statement on U.S. oceans policy. That statement made clear that the United States would continue to work with other countries to develop an acceptable oceans regime. It also made clear that the United States would protest the unilateral acts of other states designed to restrict the rights and freedoms of the international community in the use of the oceans and that the United States would exercise and assert those rights and freedoms on a worldwide basis.

The exercise of our rights provides visible and powerful evidence of our refusal to accept unlawful claims. The United States has accordingly protested and exercised rights and freedoms with respect to claims of various kinds: unrecognized historic waters claims, territorial sea claims greater than 12 nautical miles, and territorial sea claims that impose impermissible restrictions on the innocent passage of any type of vessels (such as requiring prior notification or permission). Since the policy was established, the United States has exercised its rights against the objectionable claims of over 35 countries, including the Soviet Union, at a rate of about 30–40 freedom of navigation exercises per year.

The United States has followed this policy in connection with Libya. When Qadhafi came to power in Libya, it was not long before private firms saw their interests expropriated. Then, on October 9, 1973, Qadhafi broadened the scope of his interest in expropriating the rights of others and asserted his claim to ownership of the Gulf of Sidra. The United States vigorously protested that assertion on February 11, 1974, and in the years since then, we have exercised our rights in that area on numerous occasions.

The War Powers Resolution was not intended to require consultation before conducting maneuvers in international waters or airspace in the context of this global freedom of navigation program. We are aware of no previous suggestion that the resolution would require consultation in such situations.

This question was carefully considered in connection with the Sidra exercise in March, and the decision was made that the conduct of those operations did not place U.S. forces into hostilities or into a situation in which imminent involvement in hostilities was "clearly indicated by the circumstances." The United States has conducted its exercises not only in Sidra but around the world, not only in March but for years—and, in most instances, without hostile response. We have, in fact, been in the Gulf of Sidra area 16 times since 1981, and we have crossed Qadhafi's so-called line of death seven times before the operation last March. Only once before did Qadhafi respond with military action, and, in that instance, he was singularly unsuccessful.

While we must always be aware of the risks and be prepared to deal with all contingencies, we have every right to expect that neither Libya nor any other country will take hostile action against U.S. forces while they are lawfully in and over areas of the high seas. The threat of a possible hostile response is not sufficient to trigger the consultation requirement of section 3, which refers only to actual hostilities and to situations in which imminent involvement in hostilities is "clearly indicated" by the circumstances.

Where a peaceful, lawful exercise does, in fact, result in hostile action to which U.S. forces must respond in immediate self-defense, such an isolated engagement should not normally be construed as constituting the introduction of U.S. Armed Forces into a situation of actual or imminent hostilities for the purpose of the reporting requirement of section 4 of the resolution. No report was submitted in the case of the 1981 Sidra incident, in which two Libyan aircraft were shot down after they fired at U.S. aircraft. Similarly, during the period in which U.S. peacekeeping forces were deployed in the Beirut area in 1983, many incidents occurred in which hostile forces attacked and U.S. peacekeeping forces responded in immediate self-defense. Yet, no separate war powers report was submitted for each of these incidents. Of course, a different situation might be presented if U.S. forces withdrew from an area and subsequently returned for the purpose of undertaking further military action.

As a practical matter, however, this question seems academic. In the case of the March incident in the Gulf of Sidra, for example, regardless of the applicability of the War Powers Resolution, the Administration provided Congress with all the information it needed to review the incident. As soon as hostile Libyan actions occurred, the Administration took steps to ensure that Congress was informed of the situation and was kept informed throughout the remainder of the exercise. In particular, several calls were made to congressional leaders to inform them of the events; extensive briefings were conducted for the benefit of all interested members, at which experts from the Departments of State and Defense provided pertinent information and responded to all questions asked by members; and the President sent a written report to Congress describing the events of March 24 and 25, the actions taken by U.S. forces, and the legal justification for those actions.

Military Action in Self-Defense. The third kind of situation in which war powers considerations have been raised recently is that in which U.S. forces take legitimate action in self-defense against facilities or forces of another state because of its sponsorship of terrorist attacks against Americans. In the April 14 operation against Libya, U.S. forces undertook military action in self-defense against five terrorist-related targets in order to preempt and deter Libya's unlawful aggression through terrorist force against the United States and its nationals. Does the War Powers Resolution apply to a case of this kind?

The use of U.S. forces to conduct a military strike against the facilities of a hostile, sovereign state in its own territory falls within the specific terms of the consultation requirement of section 3 of the resolution. In this context, however, a critical element is flexibility. As indicated earlier, section 3 expressly envisions the possibility that, in some instances, the President might have to act without prior consultations. In any event, he must seek to consult in a manner appropriate to the circumstances, and the need for swiftness and secrecy in carrying out a military operation is a vital factor to be weighed in determining the nature and timing of consultations that may be appropriate in a given situation.

In the case of the April 14 operation, extensive consultations occurred with congressional leaders. They were advised of the President's intention after the operational deployments had commenced but hours before military action occurred. This satisfied the resolution's requirement that consultation occur "before" the "introduction" of troops into hostilities or a situation of imminent hostilities. Congressional leaders had ample opportunity to convey their views to the President before any irrevocable actions were taken (in fact, no one who was consulted objected to the actions undertaken). The President took a serious risk in conducting these consultations. The press observed legislative leaders entering the White House for the consultations, and speculation about possible military action ensued. The press also learned immediately after the consultations that the President was to make an address later that evening, and this led to rumors of imminent military action that could have jeopardized the success of the operation.

The consultations in this case were consistent with the provisions of the War Powers Resolution. They were also consistent with and, in many respects, exceeded in scope and depth the consultations conducted on previous occasions. For example, President Ford's meeting with congressional leaders to discuss the Mayaguez operation occurred at a point in time much closer to the onset of military action than was the case here. President Carter, as I noted earlier, did not consult at all prior to the Tehran rescue mission.

Where a military action constitutes the introduction of U.S. forces into actual or imminent hostilities for the purpose of the consultation requirement of section 3 of the resolution, the action also triggers the reporting requirement of section 4. In the case of the April 14 operation, the President submitted a full report consistent with the War Powers Resolution. As the President noted in his report, the actions taken were pursuant to his authority under the Constitution, including his authority as Commander in Chief. That authority is most compelling in a situation such as this, where the use of force is essential to deter an immediate and substantial threat to the lives of Americans.

In recent weeks, the question has been raised publicly as to the President's right to take military action without the express approval of Congress. This is a question that has been addressed by executive branch officials on many occasions over the years, and their statements are well known to this committee. Without going into the specifics of those statements, it is clear that the limited actions undertaken by President Reagan in response to attacks on the United States and its citizens fall well within the President's authority under the Constitution. As noted earlier, the War Powers Resolution does not confer power on the President, but it clearly recognizes that the President has independent constitutional authority to take appropriate military action.

It is also important to note, in this regard, that the President is not simply acting alone, under his inherent constitutional authority, when taking the types of actions we are discussing today. The Congress has, over the years, learned of, considered, and effectively endorsed in principle the use of U.S. forces for a variety of purposes through its adoption of laws and other actions. Most significantly, Congress has authorized and appropriated money for the creation of forces specifically designed for antiterrorist tasks.

For example, Section 1453 of the 1986 Department of Defense Authorization Act specifically states that it is the duty of the government to safeguard the safety and security of U.S. citizens against a rapidly increasing terrorist threat and that U.S. special operations forces provide the immediate and primary capability to respond to such terrorism, and the Congress has appropriated funds for the specific purpose of improving U.S. capabilities to carry out such operations. Likewise, the Congress has appropriated considerable sums to create the naval and air forces that are needed to respond to and deter state-sponsored terrorist attacks in the manner that was done on April 14 and to carry out the exercises necessary to maintain such capabilities and to assert and protect our rights on the high seas. In this sense, Congress has participated in the creation and maintenance of the forces whose function, at least in part, is to defend Americans from terrorism through the measured use of force.

The President has openly discussed and explained the need for and propriety of these uses of force, which he has correctly assumed are widely supported by Congress and the American people. All of the actions undertaken were clearly signaled well in advance and, therefore, posed no threat to the role of Congress under the Constitution in military and foreign affairs.

Conclusion

It seems fair to say, in conclusion, that it is not clear how the War Powers Resolution, which was originally designed to provide an appropriate role for the Congress with respect to U.S. involvement in hostilities with other states, should apply to the use of U.S. forces in other kinds of situations. Some such situations—the deployment of antiterrorist units—would seem to fall completely outside the scope of the resolution. Other situations—the conduct of peaceful, lawful exercises which result in a hostile response—do not require consultations but, some might argue, may, in special situations, require a report. Still other cases—the use of U.S. forces in a legitimate, defensive strike against another state—can clearly be said to fall within both the consultation and the reporting provisions but with the form of consultation necessarily varying with the particular circumstances.

A consideration of the application of the War Powers Resolution to situations such as these does more than raise difficult and inevitably controversial issues of interpretation. On a broader level, it also highlights some of the significant negative aspects of the War Powers Resolution, whose effects on the Congress are perhaps even more profound than on the Executive. The need that some Members of Congress feel to defend the resolution's viability, even in situations well beyond those contemplated at the time of its adoption, causes Congress to shift its concern, deliberations, and political leverage away from evaluating the merits of military actions to testing their legality and to focus on formal and institutional issues rather than on the substance of our policies.. Our history amply demonstrates that Congress has adequate means, through the budgetary process and otherwise, to provide an effective check on presidential power to employ military force. But the War Powers Resolution often unwisely diverts our leaders from issues of policy to issues of law. ■

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